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**COMMENT RESPONSE DOCUMENT**  
**FOR**  
**DEFINITION OF DESIGNATED FACILITY**  
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**Response to Comments on the Proposed Clarification to the  
Definition of Designated Facility and Modification of the  
Standards Applicable to Generators of Hazardous Waste**

In the proposed rule of September 25, 1989, EPA proposed a clarification to the definition of designated facility regarding waste shipments from a state where a waste is subject to the hazardous waste regulations to a state where the waste is not yet regulated as hazardous. This circumstance can arise when EPA lists or identifies a new waste as hazardous under its pre-HSWA authority. In such a case, the waste is subject to RCRA hazardous waste regulations only in those states that do not have interim or final authorization to operate the RCRA program. In a state authorized by EPA to operate a hazardous waste program in lieu of the federal program (under the authority of section 3006 of RCRA), the waste would not be subject to RCRA requirements until the state revises its program to classify the waste as hazardous and receives EPA authorization for these requirements. This set of circumstances results from the fact that RCRA allows states a specified time to adopt new regulations in order to minimize disruptions to the implementation of authorized state programs. In contrast, this situation does not occur when the wastes are newly listed or identified pursuant to the HSWA authorities since Congress specified that HSWA provisions are to be implemented by EPA in all states until such time as states are authorized to implement the new regulations.

EPA's generator regulations require a generator of hazardous waste to "designate on the manifest one facility which is permitted to handle the waste described on the manifest." (See 40 CFR 262.20). The regulations clearly state that the facility designated on the manifest is the "designated facility" as defined in § 260.10. (See the direct reference in the definition of "designated facility" to the manifest requirement in §262.20). A designated facility as currently defined in 40 CFR 260.10 must either (1) have an EPA permit (or interim status) in accordance with Parts 270 and 124, (2) have a permit from a state authorized in accordance with Part 271, or (3) be a recycling facility that is regulated under Section 261.6(c)(2) or Subpart F of Part 266, and must also be designated on the manifest by the generator pursuant to §262.20.

It has become apparent that when promulgated in 1980, the definition of "designated facility" did not contemplate the above situation which has potentially broad impacts on the RCRA program. EPA's current interpretation of the statute is that the manifest requirement and the definition do not apply to materials that are not officially identified as RCRA hazardous wastes in the state that is receiving the wastes. Today's clarification amends the definition of "designated facility" and the standards applicable to generators of hazardous waste in 40 CFR 262.23, in order to make this interpretation clear to the public and the regulated community.

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# 1. General Comments on the Proposed Definition

A number of commenters supported EPA's effort to clarify the existing regulations so that the parties affected by non-HSWA waste identifications and listings know the status of these wastes and the management standards that apply to them when they are shipped across state borders. These commenters indicated that the proposed revision to the definition of "designated facility" in §260.10 offers additional clarity and an appropriate level of flexibility to assist both the regulatory agencies and the regulated community. Several commenters also supported the proposed change to §262.23 by adding paragraph (e) to clarify the requirement that the generator must ensure that the designated facility returns the manifest to the generator to complete the waste tracking procedures as required by RCRA regulations.

## 2. Relationship of Definition of Designated Facility to RCRA Statutory Requirements

Two commenters argued that the statute prohibits EPA from making this change to the definition of designated facility. These commenters pointed out that RCRA Section 3002 (a)(5), which sets out standards applying to hazardous waste generators, requires use of a manifest system

...to assure that all such hazardous waste is designated for treatment, storage or disposal in and arrives at, treatment, storage, or disposal facilities (other than facilities on the premises where the waste is generated) for which a permit has been issued as provided in the subtitle... (emphasis added).

Section 3003(a)(4), pertaining to transporters, contains substantially similar language.

The commenter argues that these provisions require materials that officially have the status of RCRA hazardous waste to go to facilities holding Subtitle C permits. EPA generally agrees with this view. EPA, however, notes that the mining wastes that become hazardous wastes as a result of this federal rule will not have official status as RCRA Subtitle C wastes in all states at the same time. New RCRA rules -- including new waste identification rules -- that are promulgated using statutory authorities in effect before the 1984 HSWA amendments take effect only in states that are not yet authorized to implement the pre-1984 RCRA hazardous waste program. Currently, only 7 states lack authorization for the pre-1984 program. Consequently, today's rule will take effect only in those states. In all other states, Subtitle C regulation of these wastes must wait for the states to promulgate parallel regulations or statutory changes, and obtain EPA approval to implement these new additions to their Subtitle C programs. This process can take many months. See generally 50 FR 28729-28730 (July 15, 1985), describing RCRA Section 3006. See also the state authorization section of today's notice.

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Consequently, EPA believes that the "permitted facility" requirements of Sections 3002(a)(5) and 3003(a)(4) apply only within the boundaries of those states where the relevant mining wastes have officially attained the status of RCRA-regulated Subtitle C "hazardous wastes." Status as a "hazardous waste" is, indeed, the basic prerequisite for the exercise of any Subtitle C jurisdiction. If a material is not yet a hazardous waste in the state to which it is sent for treatment, storage, or disposal, no Subtitle C regulations apply. A manifest is not legally required, and the facility that accepts the waste need not have a Subtitle C permit. EPA, in fact, would be unable to enforce manifest and permitting requirements in a state where a material is not yet a Subtitle C hazardous waste.

Since at least two interpretations of the statute are possible, EPA may exercise its discretion to choose the view that best promotes the overall policy goals of RCRA. EPA believes that there are sound policy considerations favoring the "jurisdictional" view, which considers the materials RCRA hazardous waste status to be a jurisdictional prerequisite.

The commenters' interpretation of RCRA Sections 3002(a)(5) and 3003(a)(4) would force newly regulated wastes that are generated in unauthorized states to be managed in those states. Essentially, these wastes would be "trapped" in these unauthorized states, and they could only be managed in avoidance with the treatment, storage, and disposal alternatives that are available in those states (which could be limited). This is primarily because TSD facilities in authorized states would not be able to obtain the necessary permit modification or change in interim status. Since the wastes are not yet hazardous in these states. One problem which can arise from this situation is that the facilities best suited to the management of wastes which are newly listed or identified may not be located in the states where the rulemaking is in effect. The Agency believes that such facilities should not be precluded from accepting wastes from states where the rule is in effect while the state in which they are located is seeking authorization for the waste stream.

One example of particular interstate concern involves a mixed waste stream (i.e., a waste stream that contains both hazardous waste and radioactive waste) called scintillation cocktails. Scintillation cocktails are commonly generated by approximately 10,000 hospitals and universities across the country. This waste stream became regulated pursuant to non-HSWA authority as described in the July 3, 1986 FEDERAL REGISTER notice, and therefore were initially regulated under the RCRA program only in the unauthorized states. Approximately 80 percent of the national capacity for treatment of these particular wastes resides with one facility. The Agency understands that this facility is in compliance with state standards that are equivalent to the federal RCRA requirements. However, the facility is located in a state that has not yet received mixed waste authorization, and therefore the facility

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does not have a RCRA permit or interim status. If all these scintillation cocktails were required to go to RCRA permitted facilities as suggested by these commenters, a significant number of waste shipments from thousands of generators would be disrupted. In fact, in this case the Agency believes that such a restriction would generally result in less protective waste management since it is doubtful that the wastes would be treated and recovered to the same degree as is presently occurring at this large facility.

The Agency would also like to point out that, without the flexibility provided by today's rule, there would likely be a significant disincentive for states to adopt new waste listings unless they were confident that adequate treatment, storage, or disposal capacity exists for wastes within the state. This is because generators in the first few states to adopt the waste listing would not be able to send their wastes to facilities in other authorized states (which are the vast majority of states) that have not adopted the listing because TSD facilities in these states would not be able to obtain the necessary RCRA permit modifications or changes in interim status. EPA believes that this disincentive would not be desirable.

### 3. Comments Concerning the Need for a Remedy and the Magnitude of the Existing Problem.

The same two commenters, in arguing that EPA's proposal should be withdrawn, contended that there is no firm evidence that the problem hypothetically facing the regulated community actually exists. The commenter stated that the problem is minuscule, if not completely illusory. The commenter indicated that the problem that EPA attempts to address by revising the definition of designated facilities is limited to four instances where: 1) EPA lists or identifies a waste as hazardous pursuant to non-HSWA authorities; 2) off-site management of the waste is the only available option for the waste generator; 3) the only available off-site waste facilities capable of managing the waste are located in authorized states; and 4) these facilities are not already licensed to receive any hazardous wastes as interim status or permitted facilities. The commenter indicated this scenario would occur in only a very limited number of circumstances, and therefore does not warrant any change to the definition of designated facility. The commenter goes on to say that EPA can only identify three non-HSWA rulemakings resulting in newly listed or identified wastes.

There appears to be a misunderstanding by the two commenters when they suggest that a facility in an authorized state that has interim status or a permit for any hazardous waste is eligible to be a designated facility. If one takes these commenters' view of the statutory requirement that the designated facility have a RCRA permit (described in section 2 above), and if one also reads the regulatory requirement of § 260.20 to require the designated facility have a permit "to handle the waste described on the

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manifest", then the result is that no facility in an authorized state (whether permitted or not) can accept the waste. This is because the state cannot convey RCRA approval through a permit or interim status for a facility to handle such wastes until the state program has received authorization for the particular waste. Therefore, these facilities in authorized states would not be available to manage the new waste streams under the two commenters' statutory interpretation, and in fact, this is a main reason for EPA's desire to clarify the definition of designated facility today.

EPA strongly disagrees with the statement that this is an illusory problem for the following reasons. In the September 25 proposal, EPA identified three recent non-HSWA rules only as illustrative examples of situations where interstate shipments could be a problem. However, there have been other non-HSWA rules that list or bring in new waste streams, namely: redefinition of solid waste (January 4, 1985); and mixed waste (July 3, 1986). Furthermore, the Agency recently proposed additional non-HSWA listings for wood preserving wastes, and may in the future consider the regulation of other waste streams under the Agency's pre-HSWA authority. Furthermore, as discussed in the mixed waste scintillation cocktail example above, the Agency has already encountered situations of interstate shipments affecting thousands of generators, indicating that the problem being addressed in today's rule is a real one and deserves clarification.

#### 4. Comments Concerning Disincentives for Proper Hazardous Waste Management

The same two commenters argued that EPA's proposal could create a disincentive for waste generators to ship their wastes to licensed hazardous waste facilities. This disincentive could result from allowing the generator to choose to ship its hazardous waste to either a hazardous waste facility or a nonhazardous waste facility. Given the alternatives, a generator may simply choose the least cost option.

The Agency acknowledges that this approach to interstate shipments may appear to be a disincentive to the management of these hazardous wastes in Subtitle C facilities. However, the Agency believes that there are other circumstances that mitigate this apparent disincentive. First, this situation is temporary. States are required to adopt federal RCRA waste listings or identifications within specified deadlines. Second, until that regulatory adoption, these wastes will be regulated under Subtitle D of RCRA and any other applicable requirements of the receiving state. Last, some generators will elect to send their wastes to Subtitle C facilities or other facilities that perform equivalent treatment in order to minimize any potential future liability resulting from the management of their wastes.

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##### 5. Comments Regarding Deadlines for Adopting New Waste Listings or Identifications

The two commenters also noted that the practice of shipping newly listed or identified wastes to facilities in states where the waste is unregulated would be limited to the period of time an authorized state requires to promulgate the new listing or characteristic. However, the commenters maintained that while such a period is finite, it is not necessarily short and can take up to three and a half years, assuming that authorized states comply with EPA regulations for revising state programs. The commenter further indicated that there are no immediate consequences for the state or the regulated community in that state if the state fails to meet these deadlines.

It should be recognized that the three and a half year period is the maximum allowed by the state authorization regulations. Generally, states are required to adopt federal program changes within two years (or three years if the state needs to amend its statute). Some extensions of these deadlines are available. However, EPA recognizes that while some states have been able to meet the authorization deadlines, others have not due to the number and complexity of the changes to RCRA regulations in the past few years. The Agency intends to place increased emphasis on prompt state adoption of new waste listings to ensure uniform, national coverage of newly listed or identified wastes. It should also be noted that there is a lag time between state adoption of a requirement and the official EPA action to authorize that state to implement the regulation under RCRA authority. Therefore, in many cases states are regulating these new activities in a manner equivalent to the RCRA program well before they have received authorization.

##### 6. Relationship Between Today's Clarification and Non-RCRA State Hazardous Wastes

One commenter was concerned about the situation where a waste is generated in a state which, as a matter of state law only, regulates the waste as hazardous, but is transported to a receiving state that does not. In this case, the receiving state is under no federal compulsion to amend its regulations to add that waste to its list of hazardous wastes, since the listing of the non-RCRA waste is a matter of state law. EPA has no jurisdiction over this situation. Thus, this clarification of the definition of designated facility does not apply to state listed non-RCRA hazardous waste.

A second commenter shared the above concern but also stated that EPA's proposed clarification does not distinguish between state and federally classified hazardous waste. The commenter contended that the Agency should stipulate that this clarification only applies to federally regulated wastes, that the Agency did not intend to preclude the receiving state from designating the type of facility which can manage such state-

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classified hazardous waste, and that federal authorization is irrelevant to the interstate transportation of state-classified wastes.

The Agency recognizes the issue presented by the commenter; however, EPA believes that this is not a comment on the clarification to the definition of the term "designated facility" as proposed on September 25, 1989. Rather, the issue raised by this commenter concerns the requirements of the current definition. Indeed, the current definition does not apply to non-RCRA hazardous wastes since it only applies to the hazardous wastes that the Federal government has authority to regulate (i.e., federally listed or identified hazardous wastes). If a state chooses to be more stringent and regulate additional wastes not regulated under RCRA, that state must adapt its RCRA regulations with regard to the definition of designated facility to accommodate these new wastes. Each state must determine, therefore, how it will regulate the out-of-state shipment of state-listed wastes. Furthermore, the Agency does not, under the original definition or this subsequent clarification, intend to specify to authorized states the types of facilities that can manage state-classified hazardous wastes. Finally, EPA also does not, with this clarification or the original rule, seek to regulate the interstate transportation of state-classified wastes. Neither the original federal definition, nor today's clarification has any impact on the state regulation of state-classified hazardous wastes or the out-of-state shipment of these wastes.

#### 7. Who Can Qualify as a Designated Facility

One commenter argued that EPA's proposed clarification raised ambiguities by suggesting that some kind of approval is needed in a state receiving a waste, even if none is required by state law. The concept of a state having to provide an "allowance" to a facility in order for it to accept wastes that are not regulated in the first place appeared to be burdensome and unnecessary. One commenter stated that EPA should acknowledge that a waste that is not regulated in a receiving state can be sent to any facility in that state so long as nothing under state law disqualifies it from receiving such waste.

EPA would like to clarify that under today's rule, the laws of the receiving state determine which facilities may accept and manage the waste streams. The receiving state also determines what prior approvals, licenses, permits, etc., if any, are necessary. Today's clarification adds no additional approval requirements on facilities managing non-hazardous wastes from other states. The requirements placed on these facilities are a matter of state law.

#### 8. Which Standards Apply to Interstate Shipments

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Another commenter argued that the standards of the state where the generator is located should apply to the treatment, storage, or disposal of hazardous waste, rather than the standards of the receiving state because it would be extremely burdensome for the generator of a hazardous waste to keep track of the continuously evolving hazardous waste regulations of all fifty states.

The Agency disagrees with this commenter. A state can only apply its laws and regulations to facilities over which they have jurisdiction (i.e., facilities within the state boundaries). Therefore, if a generator is sending wastes to a facility out-of-state, the treatment, storage, or disposal standards that apply are those of the state where the TSD facility is located. It is incumbent on the generator to know the requirements of the states where the wastes will be managed. However, much of the responsibility for complying with the receiving state's regulations falls on the TSD facility. In most cases, the generator simply has to ask a potential receiving TSD facility if it is allowed to manage the generator's wastes by its state government. The Agency does not believe that this is particularly burdensome to the generator.

#### 9. Comments on the Manifesting Requirements for Generators

One supporting comment was received on the requirements that the generator ensure that the designated facility and any out-of-state transporter return the manifest to the generator. The final rule is unchanged from the proposal.

#### 10. Other Comments

A minor technical correction is also included in the rule language of "designated facility" to clarify that an interim status facility in an authorized state may be a designated facility. EPA believes that it is universally understood that these interim status facilities can accept hazardous waste shipments, and this was the original intent of the provision. Therefore, in the first sentence of the rule a parenthetical clause is added with the words "or interim status".

The Agency has noted and corrected the typographical error that appeared in the proposed rule as follows: under proposed §260.10(4), the generator is designated on the manifest pursuant to §262.20, not §260.20.

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